

UNDERSTANDING THE CONCEPT OF THE VALIDITY OF A TREATY IN TERMS OF THE LEGAL BOUNDNESS OF AN INTERNATIONAL INSTRUMENT

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Abstract: *International treaties as the legal foundations of international relations serve to strengthen security and peace, expanding interstate relations in fulfilment of the goals and principles of the UN Charter. Hence, treaties maintain a prominent position in international law, the concept of the treaty, along with general concepts and principles of its validity should be defined in international law doctrine.*

Keywords: *treaties, international law, international treaties law, validity, legally binding, invalidity, error, fraud, coercion, jus cogens.*

Treaties, as legally binding instruments in international law, serve as a vital means of regulating international relations. These agreements may be established between states, between states and international organizations, or between international organizations. With their ability to codify and regulate the conduct of the parties involved, treaties play a crucial role in shaping the international legal landscape. As such, they are widely recognized and respected as a key tool for promoting stability, security, and cooperation in the global community.

Hence, while discussing treaties as sources of international law, the matter of the validity of treaties, including the factors affecting the validity, along with methods of expressing consent to be bound by a treaty should be analyzed complexly.

Article 42, paragraph 1 of the VCLT states that the validity of a treaty or a state's consent to be bound by a treaty can only be challenged following the Convention. In other words, article 42 of the VCLT stipulates that a treaty can only be terminated or ended by any other means through the application of the provisions of the Convention or the respective treaty provisions.

Paragraph 2 of Article 42 implies that the termination, denunciation, or withdrawal of a party from a treaty can only happen through the provisions stated in the treaty or the present Convention. This also applies to the suspension of the treaty's operation.

The varying rules described in paragraphs 1 and 2 pertain to the application of the VCLT solely, or the application of both the VCLT and the treaty's provisions. This distinction is based on the differentiation between the invalidity of a treaty or consent to be bound by it on one hand, and termination, denunciation, withdrawal, and suspension on the other hand.

During discussions about the validity of international instruments, the notion of a treaty's validity has been defined by A.N. Talalayev as its completeness in terms of international law, particularly its legality. This legality is what binds the treaty's signatories to its implementation and what commands respect from all other subjects of international law¹.

Some scholars expand the notion of validity beyond its legal dimensions, arguing that a variety of conditions must be met for treaties to be considered legally binding and to result in legal consequences when breached. These conditions include, but are not limited to, the capacity of parties to enter into an international treaty, the mutual assent of the parties, the legality of the treaty, and the requirements for registration and publication².

It is important to analyze certain elements that are necessary for the validity of an international instrument. These elements include the power to conclude an international treaty, the consent of all parties involved, and requirements for registration and publication of the treaty. By examining these components, we can better understand the institution of the validity of an international instrument.

For instance, the power to conclude an international treaty is given to states (article 6 of VCLT) and international organizations (article 6 of the Convention from 1986). Moreover, the power to conclude an international treaty more relevantly belongs to the institute of "full powers", which is analyzed further in the present research.

Furthermore, the other element mentioned above – consent of the parties, which is an eminent factor in treaty-making capacity, specified in Articles from 11 through 17 of VCLT, is a separate independent institute, directly affecting the validity of any international instrument.

In addition, based on paragraph 1 of Article 42 of the VCLT could be emphasized that the concept of "validity" and the idea of "the consent to be bound by a treaty" are highly relevant to and affecting each other, but at the same time, independent and separate institutions of international law of treaties.

The final element in the scope of our analysis is the requirements for registration and publication of a treaty. Article 80 of the VCLT is dedicated to the registration and publication of international instruments, which stipulates that international instruments are sent to the depositary for registration and publication (as the case may be) after they have entered into force.

Thereby, firstly, if an international instrument has already entered into force, it could be stipulated that the treaty on its own is already valid. Secondly, the publication of an international instrument may in some cases be not considered by

¹ А.Н.Талалаев Право международных договоров: Договоры с участием международных организаций / А.Н.Талалаев. – Москва: Международные отношения, 1989. – С. 148.

² Meinhard Schröder, Angela Schwerdtfeger Treaties, Validity, 2022. // <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1493>

its provisions. Therefore, requirements for registration and publication of a treaty could be assumed as a separate institution of international law theory, affecting the validity of a treaty in particular cases.

Gideon Boas attributes treaties to formal sources of international law and interchangeably uses their validity with authority. Moreover, G. Boas concludes that treaties are a source of international law, and their validity depends on fundamental assumptions about their structure³.

The concept of validity is influenced by and related to the binding force of treaties. To this extent, some authors claim that understanding the validity of an international instrument does not necessarily reflect the mandatory force of such an instrument, but in contrast, validity usually presupposes that it is applicable in a particular society and should be accepted as such by its members.

Furthermore, if previously there may have been a high degree of correspondence between the concepts of "legally valid" and "legally binding", now it is plausible to assume that documents that are not legally binding should nevertheless be checked for validity⁴. For instance, Kelsen considers concepts of validity and binding to be the same, noting that validity begins with the entry into force of the contract and can be affected, for example, by the termination of the treaty by mutual consent⁵. McCormick underlines that the binding nature of the document arises from its validity⁶.

Therefore, the bindingness of a treaty may be influenced by validity (invalidity) thoughts, as well as other considerations. Hence, a treaty may never enter into force and consequently, it does not become legally binding, but not owing to a failure based on validity. On the contrary, an instrument may be terminated and cease to be valid and binding, still, its binding nature does not discontinue by the breach of its validity⁷.

Some authors mention that a formal treaty does not necessarily designate the existence of legal obligations. Moreover, according to these theorists, the presence of authority and control is the most important. Authority is explained by whether the treaty is authoritative, while control stands for the reflection of the rule in practice of the legal system⁸.

Taking into account the above opinions on the concept of "legally binding" and "legally validness" of international treaties, in the present research we derive

³ Gideon Boas *Public International Law: Contemporary Principles and Perspectives*. Edward Elgar Publishing Ltd., Cheltenham, 2012. – P. 49-50.

⁴ Ige F. Dekker *Making sense of accountability in international institutional law*, *Netherlands Yearbook of International Law*, Cambridge University Press, 2005. – P. 83-118.

⁵ Hans Kelsen *Principles of International Law*, Rinehart and Co. Inc., New York, 1952. – P. 355.

⁶ Neil MacCormick *Institutions of Law: An Essay in Legal Theory*, Oxford University Press, Oxford, 2007. – P. 56.

⁷ Marcelo G. Kohen *Article 42 – Convention de 1969*. Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, *Leiden Journal of International Law*, 3 volumes, Brussels, Bruylant, 2006. – P. 282.

⁸ *International law: Classic and contemporary readings*. 2nd edition. Edited by Charlotte Ku and Paul F. Diehl, Lynne Rienner Publishers, USA, 2003. – P. 7.

from the consideration that if an international instrument is legally valid there must have been followed to achieve some purposes to fulfill before the treaty was concluded. Thus, these assigned tasks and goals are fulfilled via the implementation of some kind of norms, provisions, or recommendations. These norms or provisions should carry binding power to establish, amend, or abolish legal facts. The statement that an international instrument may be valid but at the same time not legally binding could be suitable only when an international instrument itself from the beginning does not carry binding character. For instance, declarations, memorandums of understanding or intent in most cases carry recommending character or establish the basis of understanding or intent, which does not contain legally binding provisions.

Therefore, while analyzing the relationship between the concepts of “legally binding” and “legally valid” in terms of international treaties, in the framework of the present research, the bottom line is that **if an international instrument is legally valid then it is legally binding unless the instrument itself is specifically established with the purpose of not carrying any legally binding nature.**

The other point to be examined in our complex analysis in the present research, as mentioned above, is factors affecting the validity of an international instrument. In this regard, basic factors affecting the validity of treaties could be categorized as follows: (a) lacking the competence (capacity) to conclude treaties, (b) concluded under specific restrictions on authority to express the consent of a state, (c) containing an error, (d) concluded by fraud, (e) concluded by corruption of a representative of a state, (f) concluded under the coercion of a state representative, (g) concluded under the coercion of a state by the threat or use of force, (h) conflicting with a peremptory norm of general international law (“*jus cogens*”).

The abovementioned proposal is justified as tolerating treaty conflicts would be tantamount to incentivizing the infringement of subsisting treaties: invalidity here would be summarized as permission for such contravention. Furthermore, it would apply with particular force if the previous treaty had been constitutional or legislative in nature.

The institution of the validity of a treaty could be affected by many factors, including (but not least) the power to conclude an international treaty, the consent of the participants, and requirements for registration and publication of a treaty, but the bottom line is these aspects are not components constituting the institute of validity, they are separate concepts of international law doctrine.

Considering the above mentioned, the most significant component validity basis on is the legality or legal authentication in full and complete form. The concept of complete legal authentication covers the full legal rightness and correct accomplishment and completeness of all necessary procedures, including rightful



expression of the consent to be bound by a treaty from its participants, appropriately provided full powers, proper registration and publication, and other legal formalities, indicated in the treaty itself for its entry into force. Other formalities could be fulfilling all necessary interstate procedures for the treaty's entry into force etc.

According to the aforementioned, within the purposes of the present research, the concept of the validity of an international agreement can be defined as follows: **the validity of a treaty encompasses essential, formal, and temporal aspects, and implies that the international instrument is legally authenticated in its entirety, and following all the consequences, including its legally binding nature for the participants.**

